IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE MELVIN MURRAY and JOHNNIE CHARLES MURRAY, Appellants,	)	
vs.	)	NO. 22340
UNITED STATES OF AMERICA, Appellee.	)	

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney
MOBLEY M. MILAM
Assistant U. S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellants to be guilty as charged in Counts One and Two of a two-count indictment following trial without a jury.

The offenses occurred in the Southern District of California. The District had jurisdiction by virtue of Title 18, United States

Code, Section 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were charged in two counts of a Two-Count indictment. The first count alleged that appellants knowingly imported and brought approximately four ounces of herion into the United States from Mexico.

The second count alleged that appellants knowingly concealed and facilitated the transportation and concealment of approximately four ounces of herion, knowing it had been imported and brought into the United States contrary to law.

On June 14, 1967, appellants were tried without a jury before United States District Judge William B. Copple [R. T. 1-3].[1] Appellants were found guilty by Judge Copple as charged in Counts

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1/ "R. T." refers to the Reporter's Transcript of Proceedings.

One and Two on June 15, 1967 [R. T. 138, C. T. 7].[2] On July 31, 1967, Judge Fred Kunzel committed appellants to the custody of the Attorney General for a period of seven years on each of Counts One and Two to run concurrently [C. T. 9, 10].

III

ERROR SPECIFIED

Appellants specified the following points upon appeal:

"1. Count One of the indictment is defective, and it was an error to enter judgment of guilty based thereon.

"2. The Court erred in failing to dismiss the indictments as to both appellants for the reason that payment of the required tax and registration necessary for legal importation would violate appellants' rights against self-incrimination.

"3. As a matter of law, no act of smuggling or importing occurred, and the Court erred in failing to dismiss the indictment as to both appellants.

"4. There was insufficient evidence to find appellant

2/ "C. T." refers to Clerk's Transcript of Record.

Johnnie Charles Murray guilty.

"5. There was insufficient evidence to find appellant Lonnie Melvin Murray guilty."

[Appellants' Opening Brief, p. 3-4]

IV

STATEMENT OF FACTS

On February 11, 1967, appellants entered the United States from Mexico at the Port of Entry in San Ysidro, California. Appellant Lonnie Murray was driving the car [R. T. 28]. His brother, Johnnie Murray, the other appellant was the passenger in the car. Appellants stated to primary Customs Inspector, Rudolph L. Dale, that they were U.S. citizens and that they had purchased nothing in Mexico [R. T. 29]. Inspector Dale had the driver open the trunk in which nothing was found [R. T. 29]. After speaking with appellants Inspector Dale accompanied them to the secondary inspection area. Inspector Dale escorted appellants into the office and proceeded, in the company of another inspector, to search the driver in the search room. Nothing was found on Lonnie Murray

[R. T. 29]. The passenger, Johnnie Murray, then was escorted to the search room and asked to empty his pockets and to remove his coat [R. T. 30]. When coat was removed, two rubber contraceptives were found tied by string around the left bicep of the passenger [R. T. 30].

Customs Agent Randolph R. Aros was called. He testified that he questioned Johnnie Murray first and Johnnie admitted having the contraband [R. T. 39]; Johnnie at first stated he and his brother came down from San Francisco the day before, but later when he saw Agent Aros viewing a PSA ticket stub, changed his story to the same day as the arrest [R. T. 39, 42-43]. Johnnie said he was approached by a white male he did not know who offered him $150.00 to take the contraband into the United States [R. T. 39]. He couldn't describe the location where he met this man and said he was supposed to deliver the contraband in Los Angeles where he (Johnnie) lived at no definite time but sometime later that evening [R. T. 39-40, 41].

Agent Aros next questioned Lonnie Murray who stated he and his brother had once lived in Los Angeles but had moved to San

Francisco and that their current address was on Eddy Street.

On cross-examination Agent Aros testified that Johnnie stated he didn't know what the contents of the package were but thought there was something wrong [R. T. 42]; that Johnnie said Lonnie knew nothing about the transaction as he was not present at the time [R. T. 43]; that Lonnie stated he and his brother lived at 1430 Eddy Street, San Francisco; however, they had given another address to the searchers [R. T. 45].

On redirect Aros testified that Johnnie said he and his brother were separated around 4:00 p. m. while Lonnie said around 3:00 p. m. [R. T. 49]. Johnnie always stated he lived in Los Angeles [R. T. 52].

The contraceptives were placed with Agent Aros [R. T. 30, 37]. These remained in his custody until the 13th of February when they were turned over to the seizure clerk [R. T. 37]. The seizure clerk, Mary McIntyre, placed the two contraceptives in the vault where they remained until February 24 at which time they were sent to the Customs chemist in Los Angeles by registered mail [R. T. 5]. George S. Hill, the Customs chemist, testified that he performed a

series of tests which enabled him to form the opinion that the contraceptives contained cocaine and herion [R. T. 19]. After performing these tests, he thereupon returned the two contraceptives by registered mail to the seizure clerk who identified them at the trial [R. T. 5]. The contraband was introduced into evidence at the close of the government's case in chief [R. T. 53].

Counsel for the appellants at this point of the trial asked the court on its own motion to dismiss Counts I and II of the indictment on Lonnie Murray alleging that no corpus delecti had been shown nor had a prima facie case been established. This point was argued and the court denied the motion allowing its renewal at the end of the case [R. T. 59].

Appellant Johnnie Murray, the passenger, testified on his own behalf and stated that he lived in San Francisco at 2028 Scott Street at the time of his arrest; that he had flown to Los Angeles with his brother who lived on Eddy Street on February 11, 1967 [R. T. 60-61]. The purpose of the trip was to visit his niece and nephew and some old friends [R. T. 62]. They visited with the nephew "a couple three hours" [R. T. 62]. Then they visited a friend, Albert Scott, nick-

named Slim, from whom Lonnie borrowed a car. After borrowing the car they got to drinking and decided to drive to Tijuana [R. T. 63]. They left Los Angeles at approximately 10:00 and arrived in Mexico around 12:00 [R. T. 64]. After arriving in Mexico they continued the drinking which they had begun in Los Angeles and visited houses of ill repute [R. T. 64-65]. At one time when the brothers were separated a man approached Johnnie and offered him $150.00 to take the narcotics across the broder to Los Angeles where the man would meet him and pay him. The man tied the contraceptives to his arm. Johnnie stated that he had no knowledge of what the object tied to his arm was [R. T. 65], and that he did not tell Lonnie about the incident [R. T. 66] and that Lonnie had no part in the transaction [R. T. 68]. He denied telling Aros he was living in Los Angeles [R. T. 67].

On cross examination Johnnie testified that he saw his brother in San Francisco nearly every day [R. T. 71]; that they probably arrived in Los Angeles about 9:00 [R. T. 72]; took a cab to the home of the niece and nephew; visited with them [R. T. 71]; and then borrowed the car. He stated that at about 4:00 the brothers separated at which time the incident with the man occurred. Between 4:00 and

8:00 at which time they were stopped at the customs inspection station the brothers had been driving around and drinking and visiting women [R. T. 74]. During this entire time the contraceptives were tied to his arm [R. T. 74]. He denied knowing there was something wrong or that he knew he was smuggling, but admitted the contraceptives were tied next to his skin, under his shirt sleeve, not hanging out, and also under his coat [R. T. 75]. He testified that if he had known he was smuggling he wouldn't have done it [R. T. 75] and yet admitted he answered "no" when asked if he was bringing anything from Mexico, even though he said he knew he was bringing the contraceptives [R. T. 76]. He denied seeing a mark left by the contraceptives or trying to avoid taking his coat off [R. T. 76]. He denied telling Agent Aros he was unemployed [R. T. 77]. He described the man [R. T. 77] but could not say in what part of Tijuana the incident occurred [R. T. 79].

In response to questions by the court, Johnnie stated that they had spent 30-35 minutes at the car lot where Scott worked; that they then drove around Los Angeles to visit other friends before deciding to go to Tijuana. He did not know how long they spent driving around

Los Angeles [R. T. 85-86].

The motion to dismiss the charges against Lonnie was again presented and again denied [R. T. 90].

Lonnie Murray was then called. He testified that he resided in San Francisco at the time of the arrest. The purpose of the visit was to see the niece and nephew and a girl friend of Lonnie's. After borrowing the car from Scott they went to see the girl friend. Since she was not home he suggested they go to Mexico. He stated that they spent 20-30 minutes with the niece and nephew and that they arrived in Tijuana about 1:00 or 2:00 [R. T. 97]. To account for the discrepancy in time of the testimony of the brothers, Lonnie stated that his brother had difficulty remembering times and numbers [R. T. 97]. The brothers had been drinking in Los Angeles and continued after their arrival in Tijuana where they parked the car in a pay parking lot [R. T. 98-99-100]. The brothers then separated, meeting at the parking lot about 4:00. Lonnie stated that he had no knowledge of the contraband and that he had made no agreement to procur contraband [R. T. 101].

On cross-examination Lonnie stated he had a job at the Eddy

Hotel, that he had suggested the trip to Los Angeles [R. T. 106] and had paid Johnnie's way [R. T. 114]; that they went from the airport to Slim's [R. T. 108, 109], and then went to his nephew's and niece's but only stayed at the nephew's 5 or 10 minutes [R. T. 110]; that they then went to 74th and Figerroa to see Linda (his girl friend) and though they were there only 10 or 15 minutes had 2, 3 or 4 drinks [R. T. 112]. He denied telling the officer that he borrowed the car from Slim to go to San Diego [R. T. 114], saying he mentioned he was going to stop in San Diego but he didn't stop there [R. T. 115].

On rebuttal Customs Inspector Dale testified that a noticeable mark remained on the passenger's arm after the string had been removed [R. T. 116]. This mark was still present 15 or 20 minutes after the string had been removed [R. T. 122]. Agent Aros also testified on rebuttal, stating that Lonnie told him he had borrowed the car to go to San Diego, that both defendants stated they were unemployed, and that Lonnie had said they lived together in San Francisco [R. T. 126-127].

V

ARGUMENT

A. COUNT ONE OF THE INDICTMENT IS NOT DEFECTIVE AND IT WAS NOT ERROR TO ENTER A JUDGMENT OF GUILTY BASED THEREON.

Appellants' first argument is based on an erroneous interpretation of the indictment. Appellants were charged with violating Title 21, United States Code, Section 174, as specifically set forth in the title to the indictment. The offense of smuggling is charged in Count One, the offense of transporting and concealing is charged in Count 2. Both offenses are punishable by virtue of Title 21, United States Code, Section 174. The words "contrary to law" in Section 174 refer to violation of Title 21, United States Code, Section 173, as held by this court in Charles Emanuel White and John Lewis v. United States of America (Ninth Circuit, No. 20,566, April 9, 1968) (see footnote 1 at page 8). Appellants were not sentenced for violating Title 21, United States Code, Section 173, which as appellants correctly argue sets forth no criminal penalty. Appellants were indicted and sentenced under counts alleging violations of Section 174. The first count uses

the phrase "contrary to Title 21, U.S.C. 173", the second count uses simply the phrase "contrary to law", but as stated previously these phrases are synonomous. Both counts allege crimes and there was no error in the conviction as to Count One.

B. THE COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENTS. THE PRINCIPLE THAT CERTAIN TAXING AND REGISTRATION PROVISIONS ARE VIOLATIVE OF RIGHTS AGAINST SELF-INCRIMINATION IS NOT APPLICABLE HERE.

Appellants argue that to import heroin in conformity with the law it would only have been necessary to pay the tax under Title 26, United States Code, Section 4721, and register under Title 26, United States Code, Section 4722. However, even if the tax had been paid and the importer had registered, the importation would have remained "contrary to law" under Title 21, United States Code, Section 173, making it unlawful to import any narcotic drug except in special circumstances which are not applicable here.

Even if a payment of the tax and registration would have rendered the importation in conformity with the law, appellants' argument is still not persuasive. The reasoning of Marchetti v.

United States, 390 U.S. 39 (1968), and Gross v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968), only applied to convictions under tax and registration provisions. If appellants were convicted under those provisions the reasoning of these cases is perhaps applicable, for in order to avoid punishment for failure to pay a tax or register they would have had to disclose information which would make them liable for prosecution under Title 21, United States Code, Sections 173 and 174, or State statutes prohibiting possession. In that situation appellants might be exposed to substantial hazards of incrimination which would bring them under the Marchetti, Gross and Haynes decisions. However, Marchetti, Gross and Haynes merely hold that those who assert the constitutional privilege against self-incrimination may not be punished for failure to comply with tax and registration statutes. Appellants are not being punished for failure to comply with tax or registration statutes but for importing, transporting and concealing narcotics drugs in violation of Title 21, United States Code, Sections 173 and 174. The heroin was imported, transported and concealed "contrary to law" and the court did not err in failing to dismiss the indictments.

C. AN ACT OF SMUGGLING OR IMPORTING OCCURRED AS A MATTER OF LAW, AND THE COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENT AS TO BOTH APPELLANTS.

It is conceded that neither Title 21, United States Code, Section 173 nor Section 174 sets forth attempted smuggling as an offense and that attempts to smuggle are not smuggling. Keck v. United States, 172 U. S. 434 (1899). It is contended, however, that there was a completed act of smuggling. The aforesaid sections prohibit the importation of narcotic drugs into the territory of the United States, and the intent of Congress in enacting them was determined in Palermo v. United States, 112 F. 2d 922, 924 (1940) as follows:

> to penalize not only the importation of opium across customs lines but also the bringing of it into the territorial limits of the United States.

In Williamson v. United States, (9th Cir. 1962), 310 F. 2d 192, smuggling was defined as the bringing on shore (i. e., within the territorial limits of the United States) of goods for which the duty has not been paid or goods the importation of which is prohibited.

The decision in Ortiz v. United States, (5th Cir. 1964) 329 F. 2d 381, and the construction which appellants give it in the light of Marchetti (supra), Gross (supra), and Haynes (supra) is not applicable in this situation even if correct. We are not dealing with marihuana or other goods which are termed "smuggled" merely because the tax and registration or duty provisions have not been complied with, but with narcotic drugs, the importation of which is prohibited except under special circumstances, Title 21, United States Code, Section 173. Where there is an absolute prohibition against the importation of a particular item, the act of smuggling is complete when the item is brought within the territorial limits of the United States. (Williamson, supra; Palermo, supra). Appellants crossed the external border between the United States and Mexico, completing the act of smuggling as charged in Count One; they then transported and concealed the narcotic drugs in their possession, thus completing the act charged in Count Two.

D. THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT JOHNNIE CHARLES MURRAY GUILTY.

Johnnie Charles Murray entered the United States with narcotic drugs concealed on his person. This was shown by the testimony of the Inspector Dale, Customs chemist Hill and the appellant himself. His possession was such as to establish both control over the drugs and knowledge of their presence. (Evans v. United States, 9th Cir. 1958, 257 F.2d 121, cert. denied 358 U.S. 866, rehearing denied 358 U.S. 901 (1958). The inference provided in the statute (21 U.S.C. 174) arises and provides sufficient evidence to convict unless the appellant explains his possession to the satisfaction of the trier of fact. (Green v. United States, 9th Cir. 1960, 282 F.2d 388, cert. denied 365 U.S. 804 (1961). The explanation which Johnnie provided depends entirely upon his credibility. There was no other evidence which he offered to substantiate his story. The credibility of a witness is to be determined solely by the trier of fact. (David v. United States, 148 F.2d 203, 1945). Here the story which Johnnie offered was not believed. The inference arising from the fact that he possessed

the narcotics at the time of entry into the United States remained viable (Caudillo v. United States, 9th Cir. 1958, 253 F. 2d 513).

Johnnie knew he was taking something across the border which he did not declare and which was hidden. The circumstances in which he supposedly received the contraband were unusual indeed—a strange man approached him and offered him $150.00 to take the two contraceptives and their contents across the border. Even Johnnie testified during cross examination that he was not certain that there was nothing wrong with his act [R. T. 75]. From this the requisite guilty knowledge may be inferred.

The possession of the drugs, the negative declaration, the physical act of importing, the concealment of the contraband, the failure to explain the possession to the satisfaction of the trier of fact are clearly sufficient evidence to find Johnnie Charles Murray guilty.

E. THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT LONNIE MELVIN MURRAY GUILTY.

As appellant argues Lonnie's conviction rests largely upon the

inference arising from possession of the drug, although the trial court inferred actual knowledge of the presence of the contraband narcotics from the close relationship of the brothers. This was shown by the fact that they saw each other almost every day and traveled together. The mark left on Johnnie's arm after the string was removed indicated that the string must have been tied tightly by someone other than Johnnie. This circumstance indicates the knowledge of the presence of the contraband by someone other than Johnnie. The court did not believe Johnnie's story about the stranger which leaves Lonnie as the only other reasonable party who may have tied the string.

That Lonnie Murray was not in actual physical possession of the contraband narcotics is clear. He did, however, have constructive possession of the contraband and this is sufficient to authorize conviction. United States v. Hernandez (2nd Cir. 1961) 290 F. 2d 86. Constructive possession may be established by circumstantial evidence. Green, supra; Evans, supra; Rodella v. United States (9th Cir. 1960) 286 F. 2d 306, cert. denied 365 U. S. 889 (1961).

Circumstantial evidence is insufficient to establish constructive possession in one person only if possession is solely in another. Bass v. United States (8th Cir. 1964) 326 F.2d 884. There is no showing that Johnnie had sole possession of the contraband narcotics, i.e., that he had the sole dominion and control of the contraband so as to give him the sole power of disposal. Rodella, supra. Lonnie had borrowed the car and had driven it to Tijuana. He was driving the car when it was stopped at the customs line. The court in Evans, supra, states at page 128:

> Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof. [i.e., possession].

Lonnie had suggested the trip to Los Angeles and the trip to Tijuana. In addition he had financed the excursion. These circumstances add support to the contention that he had dominion and control of the automobile and that Johnnie did not have sole possession. Covarrubias v.

v. United States (9th Cir. 1959) 272 F. 2d 352.

Johnnie claims that he alone was aware of the contraband and that the possession was his alone. However, there is strong evidence of a joint venture, similar to that in Eason v. United States (9th Cir. 1960) 281 F. 2d 818). Appellants were close brothers, who saw each other almost daily in San Francisco. They traveled together from San Francisco to Los Angeles. They were together in Los Angeles. They traveled together and remained together most of the time in Tijuana. The activities of the day were similar and shared. They returned from Tijuana together. These circumstances indicate that the possession was joint.

Lonnie was indeed in constructive possession of the contraband and narcotics, and without an explanation of his possession satisfactory to the trier of fact, possession raises an inference on which to base a conviction. Considering all the circumstances this inference was a reasonable one. There was sufficient evidence to find Lonnie Melvin Murray guilty.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

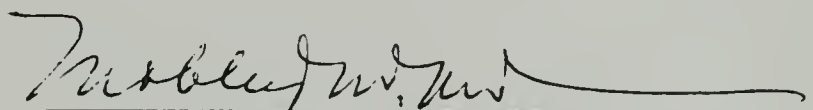
EDWIN L. MILLER, JR.,
United States Attorney

MOBLEY M. MILAM,
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



MOBLEY M. MILAM